United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1337

To be argued by
ALLEN R. BENTLEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1337

UNITED STATES OF AMERICA,
Appellee,

—v.—

NELSON CRUZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ALLEN R. BENTLEY,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

PAGE

OTHER AUTHORITIES

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FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

—v.—

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Preliminary Statement

Nelson Cruz appeals from an order of the Honorable Marvin E. Frankel, United States District Judge, entered in the United States District Court for the Southern District of New York on July 8, 1976, denying his motion for an order pursuant to Federal Rule of Criminal Procedure 35, reducing his sentence to time served.

Statement of Facts

Indictment 75 Cr. 1150 was filed on November 24, 1975, in three counts. Cruz and codefendants Willie Johnson, Herbert Banks and Charles Rubinstein were charged in Count One with conspiring to steal goods from an interstate shipment in violation of Title 18, United States Code, Sections 371 and 659. Cruz, Johnson and Banks were charged in Count Two with the substantive offense of theft from an interstate shipment in violation of Title 18, United States Code, Sections 659 and 2. Rubinstein was charged in Count Three with receiving goods which had been so stolen in violation of Title 18, United States Code, Section 659.

Cruz entered a plea of guilty to Count One of the indictment on December 23, 1975.* On February 11, 1976, Cruz was sentenced to the custody of the Attorney General for imprisonment for a period of two years, ostensibly as a young adult offender pursuant to Title 18, United States Code, Section 5010(b) as made applicable to him by Title 18, United States Code, Section 4209.** Not long after Cruz' arrival at the Federal Correctional Institution in Petersburg, Virginia, where he is now serving his sentence, he and his attorney were informed that the Bureau of Prisons took the view that a two-year maximum sentence was not permitted under Title 18, United States Code, Section 5010(b), since the Federal Youth Corrections Act, Title 18, United States Code, Sections 5005-5026 ("FYCA"), precludes use of any ceiling other than that established in the Act. Thereafter, an official at Petersburg wrote to the United States Attorney for the Southern District of New York stating the position of the Bureau of Prisons and suggesting that Cruz' sentence be vacated as illegal and that he be resentenced.

On May 20, 1976, Cruz made a motion pursuant to Federal Rule of Criminal Procedure 35 seeking a reduction of his sentence to time served. In addition to a plea for leniency based on the fact that his wife was pregnant, Cruz asserted as grounds for his Rule 35 motion the fact that the Parole Commission intended, in computing Cruz' release date, to disregard the two-year limitation that the Court had set, on the view that such a limitation in a sentence imposed under Section 5010(b) was not valid. As a result of the Parole Commission's interpretation of the statutes, Cruz could not expect to be released until he had

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* Johnson and Banks pleaded guilty to Count Two of the indictment and were sentenced to imprisonment for a period of four years. Rubinstein pleaded guilty to Count Three of the indictment and was sentenced to six months' imprisonment to be followed by fifty-four months probation.

** Section 4209 was recodified as Title 18, United States Code, Section 4216, by Section 3 of the Parole Commission and Reorganization Act, P.L. 94-233, effective May 14, 1976.

21 months of his sentence. Affidavit of Benjamin ermyer, sworn to May 20, 1976. ¶ 5.

June 8, 1976, the Assistant United States Attorney ed to this case wrote the District Court urging that

"Cruz's sentence was not valid under the [Youth Corrections] Act in that Section 5010(b) requires that the sentencing count delegate the release decision to the Board of Parole and precludes the imposition of any maximum sentence short of the maxima embodied in Section 5017(c) of Title 18, U.S.C."

is letter was supplemented by a further letter dated 25, 1976, in which certain additional authorities g on the issue were analysed.

July 8, 1976, the District Court rendered an opinion g that "the sentence herein was valid, and . . . not be reduced." The Court reasoned as follows:

"Section 5010(b) under which the defendant was sentenced, allows the Court 'in lieu of the penalty of imprisonment otherwise provided by law, [to] sentence the youth offender to the custody of the Attorney General for treatment and supervision * * * until discharged by the Division as provided in Section 5017(c) * * *.' Section 5017 (c) requires the Parole Commission to release an offender sentenced under Section 5010(b) 'conditionally * * * on or before the expiration of four years from the date of his conviction and * * * unconditionally on or before six years from the date of his conviction.' There is nothing magical about the six-year figure; it is merely the outer limit imposed upon the Parole Commission in the absence of more specific instructions from the Court. Neither of the cited sections explicitly prohibits the Court from committing a youth to the custody

> of the Attorney General for a maximum term short of six years. Inferring such a prohibition from the equivocal terms of an Act which was said to 'take nothing [in the way of sentencing discretion] away from the court' would pervert the legislative purpose to serve no end other than a drily harsh literalism. Insofar as the text of the F.Y.C.A. gives color to the position of the Bureau of Prisons and the Parole Commission, doubts are to be resolved in favor of lenity. See *Bell* v. *United States*, 349 U.S. 81, 83 (1955). The Hobson's choice the Government now finds compulsory for the Court cannot be deemed to have been intended by a Congress bent upon preserving the existing sentencing powers of the Court while adding a new avenue for humane treatment."

The Office of the United States Attorney was directed report within ten days on what action would be taken by the Bureau of Prisons and the Parole Commission in response to the Court's ruling.

On July 22, 1976, the Assistant assigned to this matter advised the Court that Cruz would not be held in custody or subjected to post-release supervision beyond February 22, 1978. The Court was further advised, however, that the Bureau of Prisons would not award Cruz "good time" because he was not serving a "determinate sentence" within the meaning of Title 18, United States Code, Section 4161, and that the Parole Commission was of the opinion that Cruz, upon his unconditional release, would be ineligible for a certificate vacating his conviction under Title 18, United States Code, Section 5021.

On July 19, 1976, Cruz filed a notice of appeal from the order of the Court dated July 8, 1976. On July 23, 1976, the Court issued a memorandum reporting on the

Government's letter. While Judge Frankel observed that "those who have .... Cruz incarcerated plan to follow their own rather than the Court's understanding of the judgment," he denied Cruz relief on the ground that Rule 35 was not the appropriate procedure for obtaining compliance with the sentence imposed on February 11, 1976.

ARGUMENT

POINT I

The Original Sentence Imposed on Cruz was Invalid; the Case Should Be Remanded for the Imposition of a Proper Sentence.

Cruz asks this Court to vacate his judgment of conviction and remand for a resentencing. While we agree that the case should be remanded for resentencing, we reach that conclusion for reasons diametrically opposed to those asserted by Cruz, and with a different purpose. Our interpretation of the FYCA is that it gives a Federal sentencing judge the option, in addition to treating an eligible offender as an adult, of sentncing a defendant to a term of probation under Title 18, United States Code, Section 5010(a), or to an *indeterminate* term of treatment and supervision under Title 18, United States Code, Sections 5010(b) or (c). Since Judge Frankel did neither of these, but rather sentenced Cruz to a *determinate* term of two years under Section 5010(b), it follows that the sentence was incorrect and invalid. The case should be remanded for resentencing pursuant to one of the lawful alternatives provided by the statute. The principal focus of this portion of our argument, therefore, is on the legal issue of whether the District Court was enpowered to impose a sentence under the FYCA with a "ceiling" shorter than that provided in the Act. We submit that

the legislative history and the plan of the Act both show that the District Court was not so empowered.

A. The History of the Youth Corrections Act shows that it was intended to establish a system of "indeterminate" sentencing.

The legislative history of the Federal Youth Corrections Act demonstrates that its principal innovation was a system of indeterminate sentencing. That history makes it clear that Congress intended to enact a system of indeterminate sentencing, with the decision as to the terms and timing of release resting solely in the Executive Branch. A report of the House Judiciary Committee accompanying the legislation stated:

> "Since 1941, a committee of the Judicial Conference of the United States has been studying the general subject of punishment for crime. . . . The study has been extensive and thorough. The committee made a report to the Judicial Conference in 1942 and that report was presented before hearings held the following year in the House of Representatives and the Senate. The legislation under consideration at that time prompted objections because it included what has been termed an 'indeterminate' sentence for adult offenders. Thereafter the conference several times reaffirmed its recommendations dealing with youthful offenders, which were not the focal point of previous objections, and *these recommendations* as approved by the conference in September 1949 *are embodied in the present bill.*" H.R. Rep. No. 2979, 81st Cong., 2d Sess., *reprinted in* 1950 United States Code Cong. & Adm. News 3983, at 3984 (emphasis added).

The 1942 report to the Judicial Conference by its Committee on Punishment for Crime, referred to in the

House Judiciary Committee report just cited, proposed a system of indeterminate sentencing for all offenders.* The committee described "the indeterminate sentence" as

> "an effort to make punishment truly reformative. Its theory is that one who has been guilty of serious infraction of the criminal laws should be imprisoned for such time as is necessary to cure him of his antisocial tendencies and should then be conditionally released under parole, with adequate supervision, for such time as is necessary to restore him to the normal life of a law-abiding citizen of the community. Since it is impossible to foresee what term of imprisonment and supervision may be necessary to accomplish this result, sentence is not to be for a definite term but for such time as may be necessary to rehabilitate the offender and restore him to his place in society. *Release is to be determined by a board* which will have expert advice and assistance and will give the prisoner an absolute release only when satisfied that a changed social attitude on his part justifies it." Report to the Judicial Conference of the Committee on Punishment for Crime pp. 4-5 (June 1942) (emphasis added).

Title III of the draft legislation that accompanied the Committee Report, *id.*, pp. 14-20, embodying its recommendation for the sentencing of youthful offenders, contained virtually every one of the provisions enacted eight years later as the FYCA. The Committee reported that

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* The proposal did not extend to cases in which the sentencing court believed incarceration was unnecessary; in addition, for administrative reasons, cases in which a sentence of one year or less was imposed were excluded from its scope.

> "The act gives to the judge power . . . in his discretion, to sentence the youth to the control of the Youth Authority Division of the Board of Corrections for correctional treatment. If this is done, the youth remains in the custody of the Authority for not more than 6 years. *The Authority* may release him conditionally under supervision at any time, and is required so to release him at the end of four years. *Id.* p. 9 (emphasis added).

The deliberations of the Judicial Conference Committee, and particularly the views expressed by its members at its initial meeting on November 8, 1941, make it clear that the notion of a judicially-imposed ceiling on the custodial treatment of a youthful offender was antithetical to the rehabilitative system that was eventually proposed. In the words of Chief Judge Orie L. Phillips, chairman of the subcommittee on youthful offenders:

> ". . . if corrective treatment and not deterrent treatment is the answer to the big problem, then I haven't any doubt in my own mind that neither judge nor board can forecast either the minimum or maximum of such treatment, and that that must be worked out by a system that is elastic enough, that ought not be too short and ought not be too long; and therefore it does seem to me that the indeterminate sentence, which gives the elasticity, is a sound basis of sentence under which such treatment will be carried out. I accept the general principle of indeterminate sentence. I think it is sound." Proceedings of the Committee of the Judicial Conference on the Indeterminate Sentence and Punishment of Crime, November 8, 1941, p. 132.

Circuit Judge John C. Collet, a member of the same subcommittee, stated:

> "I have this tentative view of the indeterminate sentence proposal, that it is probable that the youth could secure much more from the present law than has been secured, with some cooperative spirit between the courts and the Board of Pardons and Parole . . .
>
> "But the present system cannot be used, in my judgment, to the extent that it will offer a means of accomplishing one of the principle results that the indeterminate sentence law appears to be susceptible to and that is . . . the fixing of the sentence in the light of more careful study and fuller consideration of the individual case." *Id.* 101.

The one committee member who expressed explicit reservations about the indeterminate sentencing proposal at the initial meeting of the Committee, Chief Judge Carroll C. Hincks,* concurred in later Subcommittee and Committee reports recommending its enactment. Nowhere in the history of the FYCA—neither in the transcripts of the November 8, 1941 and February 24, 1942 meetings of the Committee, nor in the June 1942 report of the Committee to the Judicial Conference, nor in the report of the Senate and House Judiciary Committees accompanying S. 2609, the bill which became the FYCA—is there *any* authority for imposition of a fixed ceiling in connection with a Youth Corrections Act sentence.

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* "I do not feel wholly satisfied that an administrative body is necessarily essentially better qualified to use the wide discretionary powers involved in sentencing than a judge." *Id.* 105. While this dissenting voice reflects a different view of the wisdom of the legislation ultimately enacted, it conclusively demonstrates that even in Judge Hinck's view it was the agency, and not the sentencing judge, who would determine the time for release under the legislation.

B. A determinate sentence has no place in the structure of the Youth Corrections Act.

Even more significantly, we submit, a reading of the entire Act reveals that the approach taken by Judge Frankel was simply not contemplated. A proper understanding of the role that indeterminate sentencing plays under the Act requires analysis of the "system of analysis, treatment and release," H.R. Rep. No. 2979, 81st Cong., 2d Sess., *reprinted in* 1950 United States Code Cong. & Adm. News 3983, that Congress enacted. Those provisions of the Act dealing with commitment, release and vacatur of the conviction record are critical to this analysis.

Commitment under the Act is governed by Section 5010(b), which provides:

> "the Court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the [young adult offender] to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Parole Commission as provided in Section 5017(c) of this chapter. . . ." *

Release of those committed under the Act is governed by Section 5017. That section creates a distinction between conditional release, after which the offender is at liberty under supervision, and unconditional release; it authorizes conditional release "at any time," to be followed by unconditional release as early as one year there-

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* A young adult offender may also be committed under Section 5010 (c) in certain cases. See pp. 16-17, *infra*. Sections 6 and 11 of the Parole Commission and Reorganization Act, P.L. 94-233, effective May 14, 1976, amended the FYCA to substitute the Parole Commission for the Division of Youth throughout the Act.

after. For young adult offenders sentenced under Section 5010(b), Section 5017(c) mandates conditional release within four years of commitment, and unconditional release within six years of commitment. In effect, Section 5010(b) effectuates the very consolidation of sentencing authority and responsibility for custodial rehabilitation and post-release supervision that was strongly recommended to the Judicial Conference Committee, *see, e.g.* Tr. of Proceedings on November 8, 1941, pp. 34-35, Section 5010(b) permits the Parole Commission to determine what combination of custody and probation is appropriate in view of the problems of the individual young adult offender; the authority of the Commission ranges from ordering immediate release followed by a year of noncustodial supervision, in effect, imposition of a sentence of one year's probation, to four years of confinement followed by two years of such supervision. The absence of any reference in Section 5017—or, indeed, in *any* part of the statutory scheme or the legislative history—to release pursuant to a judicially-imposed ceiling shows that the permissive language of Section 5010(b) does not authorize discretion to fix a maximum sentence with the framework of the Act.

The view that a determinate sentence is impermissible under the Act is reinforced by reference to Section 5021. That section provides for the issuance of a certificate vacating the conviction record in the case of a young adult offender unconditionally discharged *before* "the expiration of the maximum sentence imposed upon him," 18 U.S.C. § 5021(a) (emphasis added). A determinate sentence such as that imposed on Cruz is seriously inconsistent with the framework of the Act in that it virtually precludes any meaningful post-release supervision in the community and insures that the defendant will not be unconditionally discharged until the expiration of his maximum term. Since an offender released under the term

of a judicially-imposed ceiling is not released "*before* the expiration of the maximum sentence imposed upon him"—indeed, the Commission may be forced to discharge him unconditionally before completion of the year of post-release supervision mandated by Section 5017(b)—he is not entitled to a certificate of vacatur under Section 5021(a).

The three aspects of the Act that set it apart from adult sentencing provisions—an indeterminate sentence, separate confinement for young adult offenders, and ultimate vacatur of the conviction—are integral components of a statutory scheme intended to be applied together or not at all. The authority of the Parole Commission to retain an offender in custody for up to four years is as vital a part of the Act as the separation of young adult offenders from hardened criminals, or the automatic vacatur of the criminal conviction in the case of a young adult offender unconditionally discharged before expiration of his maximum term. It cannot seriously be doubted that a sentence under the FYCA that denied a young adult offender the opportunity to receive treatment at a special institution, or denied an offender the benefits of Section 5021, would be invalid. Cf. *United States* v. *Waters*, 437 F.2d 722 (D.C. Cir. 1970). Similarly, a determinate two-year maximum sentence is invalid because it ignores one of the most basic objectives of the act—to give the Parole Commission an adequate period of time within which, if found necessary in *its* discretion, it can seek the rehabilitation of the committed youthful offender. Even though the imposition of a determinate sentence may not result in any shortening of the period of actual confinement—in Cruz's case, for example, it is very likely that he will be conditionally discharged before two years elapse—it significantly shortens the duration of possible post-release supervision, and most importantly, deprives the agency of the "elasticity" the framers of the legislation found necessary.

The interpretation of the FYCA by the Supreme Court in *Dorszynski* v. *United States*, 418 U.S. 424 (1974), confirms this analysis. In that case, the Court was presented with a question not raised here, that is, whether a District Judge choosing *not* to employ the alternative procedures provided by the FYCA must give his reasons for doing so. In the course of the opinion, however, the Court devoted several pages to a discussion of the purpose, plan and function of the Act. *Id.* at 431-436. In addition to noting that the Act was "an outgrowth" of recommendations made by the Judicial Conference, of which mention has been made, *supra*, the opinion notes that the Act gives sentencing judges "*two* new alternatives", namely, committing an eligible offender "to the custody of the Attorney General" under Title 18, United States Code, Sections 5010(b) and (c) or placing him on probation under Title 18, United States Code, Section 5010(a). *Id.* at 433 (emphasis added). Absolutely no mention is made of the third alternative invented by Judge Frankel, that is, of allowing the offender the benefits of the Act *with* a predetermined ceiling.

More importantly, subsequent language in the Court's opinion confirms our analysis that the Act was intended to provide a comprehensive plan for the treatment of young offenders, and was not intended simply to provide sentencing judges with a smorgasbord of program elements with which a judge may fashion his own plan. For example, the opinion noted that under a youthful offender sentence "the execution of sentence was to fit the person, not the crime for which he was convicted." *Id.* at 434. Obviously, a tailoring of the "execution" of the sentence to the offender must rely on fitting the time and conditions of release to observation of the offender during confinement—an important procedure that is impossible if a fixed termination date is imposed. The Court further noted, "In addition to institutional treatment, *the Division* was empowered to order conditional release under supervision

at any time. . . ." *Id.* at 434 (emphasis added). Quite clearly, the power to order release was *not* conferred on the District Court. In short, the quoted portions and other language of the opinion make it crystal clear that the Parole Commission was to be conferred sole discretion to determine treatment and release of an offender committed under the Act.*

The sentence imposed by Judge Frankel shortening the period of supervision and otherwise interrupting the plan of the FYCA subverts the very purpose of the Act. His conclusion that he, rather than the Parole Commission, should choose the timing and the period of the supervision constitutes a plain rewriting of the legislative framework. As such, it is incorrect.

C. No persuasive judicial authority supports the District Court's reading of the Youth Corrections Act.

The opinion of the District Court cites three reported judicial opinions—*Salchfield* v. *United States*, 450 F.2d 284 (5th Cir. 1970); *Minshew* v. *United States*, 410 F.2d

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* While certain language in the *Doszynski* opinion emphasizes that "the Act was meant to enlarge, not restrict, the sentencing options of federal trial courts," see 418 U.S. at 436, it is obvious that this language was not directed to the District Court's discretion in fashioning a sentence under the Act, but simply to the Court's discretion whether or not to employ the alternatives provided by the Act in the first place. This was in direct response to a principal contention raised by the appellant-defendant, that is, that since he was eligible for treatment under the Act he should be so designated as a matter of right. While the Court's opinion concluded that the sentencing court had discretion not to sentence an offender as a youthful offender, it clearly offered no support for Judge Frankel's conclusion that a youthful offender sentence may be coupled with a definite expiration date shorter than the legal maximum.

396 (5th Cir. 1969); and *United States* v. *Borawski*, 297 F. Supp. 198 (E.D.N.Y. 1969)—and one as yet unreported decision—*Kayamakcioglu* v. *United States*, — F. Supp. —, 76 Civ. 910 (CLB) (S.D.N.Y., June 2, 1976) —in support of the view that a determinate sentence is valid under the Act. We respectfully submit that none of these cases provides persuasive authority for the sentence imposed herein.

Kayamakcioglu is the most recent of the opinions cited in Judge Frankel's opinion, and the only one purporting to find in the structure of the Act authority to impose a determinate sentence. In *Kayamakcioglu*, the District Court (Brieant, J.) held that a determinate sentence was authorized by Section 5010(d).*

We respectfully urge that *Kayamakcioglu* is wrongly decided in that the language of the Act does not support the conclusion that Section 5010(d) authorizes imposition of a determinate sentence. Indeed, Section 5010(d) merely

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* This subsection provides:

"If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision."

Judge Brieant reasoned in part as follows:

"Subsection (d) of § 5010 is an integral part of the statutory scheme to allow the Court . . . to 'sentence the youth offender under any other applicable penalty provision' and believes [sic] that it was not the intent of Congress in so doing to imply that such a sentence was an adult sentence. The Court has the power to treat youthful offenders as adults if the Court is of the opinion that the youth will not benefit from being treated under the Youth Corrections Act, and because of the gravity of his crime, or the extent of his prior record, ought to be sentenced as an adult. If that were the sole purpose as subsection (d) then subsection (d) would be totally superfluous, since no recourse to the optional provisions of the Youth Corrections Act are needed in order to sentence a youth as an adult. We should not construe any statute as containing an intentional superfluity." *Id.* p. 5.

makes it clear that the Act is an optional sentencing device and not a mandatory procedure for all those failing within its age limits, as the Supreme Court held in *Dorszynski* v. *United States*, *supra*. No superfluity results from reading Section 5010(d) solely as authorizing sentencing as an adult, under the general penalty provisions and entirely outside of the Act.*

Moreover, even assuming that the optional nature of the Act is apparent in other provisions than Section 5010(d), that section would still not be superfluous because it substantially qualifies the discretion arguably granted to the court by Section 5010(b) since as it requires, as a precondition of resort to any other applicable sentence, a finding that the youthful offender will not derive benefit from custodial treatment under the Act. See *Dorszynski* v. *United States*, *supra*.

Rather, to read Section 5010(d) as authorizing imposition of a determinate ceiling under the Act is to render superfluous the section that immediately precedes it. Section 5010(c) expressly permits sentences under the Act of more than the maximum of six years permitted under Sections 5010(b) and 5017; it authorizes the Court to fix a maximum term not in excess of the statutory maximum established by law for adults convicted of the offense

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* In view of the ambiguity of the remainder of the Act on this point, Section 5010(d) was needed to insure that the Act would not be mechanically employed, resulting in the automatic sentencing to treatment under the Act of even the most hardened young defendants. Other than Section 5010(d), only Sections 5010(a), (b), and (c) can be read as reflecting the optional nature of the Act. The permissive language employed in these sections might be construed as giving a sentencing court discretion only as to which of the three specific sentencing options *within* the Act should be invoked, and such a construction would be at least as plausible as the interpretation that Congress, by using the word "may," meant to preserve the court's authority to sentence those aged 18 to 22 as adults in proper cases.

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one of the possible consequences of his plea
on of a sentence under the Act.** Nothing

decision in *Kayamakcioglu* v. *United States*, Judge
affirmed his opinion in a memorandum relying on
and on Judge Frankel's opinion in this case.
. Jackson, 76 Cr. 247 (S.D.N.Y., October 7, 1976).
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er two years." Tr. of Dec. 23, 1975, pp. 4-5.

in either *Satchfield* or *Minshew* can be read as endorsing plenary power in the sentencing judge to decide that the maxima under the Act were excessive in a particular case.

In *United States* v. *Borawski*, 297 F. Supp. 198 (E.D.N.Y. 1969), a District Court imposed a "split sentence" of 6 months' incarceration to be followed by 30 months' probation, relying on Section 5010(a). The Court noted that "[s]trictly interpreted, this section [5010 (a)] may be inapplicable here," 297 F. Supp. 199, but justified the sentence by stating that the purpose of citing the Act was "to confer a benefit on the defendant," 297 F. Supp. 200, namely, vacatur of the conviction record pursuant to Section 5021. *Borawski*, we submit, erroneously invades the discretion over the release decision vested by law with the Parole Commission.

In sum, the argument that a determinate sentence may be imposed under the Act is unsupported by any cohesive reading of the statute, is inconsistent with the Act's purposes, and has not been shown by any reasoned judicial precedent to be authorized by law. Furthermore, in imposing a youthful offender sentence with such a "ceiling," the District Court is simply not "resolving ambiguity in favor of lenity," as both the District Court in this case and the *Kayamakcioglu* court contended, citing *Bell* v. *United States*, 349 U.S. 81, 83 (1955). The statute is absolutely unambiguous, providing for three specific alternatives within the framework of the Act and for the further option of treating the offender as an adult. Moreover, a sentencing as a young adult offender with a judicially-imposed ceiling is simply not a benefit of which the defendant would be, under our reading of the statute, unfairly deprived. Rather, such a sentence is a judicially-contrived amalgam of other sentence alternatives provided by the Act, which

is less severe than an indeterminate sentence in that it protects the defendant against lengthy probation and the possibility of re-incarceration for its violation, but is more severe in terms of the consequences which flow from its application in the overall context of the Act.*

The sentence imposed was simply incorrect and unauthorized. The Supreme Court in *In re Bonner*, 151 U.S. 242, 256 (1894), offered this wise caution against such judicial legislation:

> "[I]n all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms."

It follows that the judgment of the District Court should be vacated, and the case remanded for resentencing, as the appellant requests, with the order, however, that the sentence consist either of a term of years imposed pursuant to the general sentencing provisions applicable to adults, as authorized by Section 5010(d), or that Cruz be to be sentenced under one of the specific provisions of the Youth Corrections Act.

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* By imposing a two-year "ceiling," Judge Frankel has deprived Cruz of one of the most valued benefits of the FYCA, that is, eventual vacatur of his conviction. When Cruz is unconditionally discharged on February 22, 1978, as required by Judge Frankel, he will not have been so discharged "before the expiration of the maximum sentence imposed on him"; indeed, in all likelihood he will not then have been subject to even the one year of post-conditional release supervision which Congress thought minimally necessary. *See* Title 18, United States Code, Sections 5017 (b) and 5021 (a). To suggest, as Cruz does, that he will then be eligible for a Section 5021(a) certificate is to call for abrogation of the statute by judicial fiat.

POINT II

If the Sentence Imposed on Cruz was Valid, the Order Denying his Rule 35 Motion Should Be Affirmed.

We respectfully urge, for reasons set forth in Point I, *supra*, that Cruz' motion should have been granted to the extent of vacating the sentence imposed on him as illegal and setting this matter down for resentencing in compliance with the applicable sentencing provisions. If, however, this Court should find that a two-year determinate sentence can properly be combined with provisions of the Youth Corrections Act, or that the Government's objection to the sentence was untimely,* the denial of Cruz' Rule 35 motion should be affirmed.

As we read the Parole Board Guidelines in effect at the time of Cruz' initial parole consideration, whether Cruz was sentenced to an indeterminate term under the Act or to a two-year sentence as an adult had no effect on his eligibility for release on parole, since the maximum sentence imposed by the Court operates only to require release when such sentence is shorter than the period indicated by the Guidelines. As pointed out in Point I, *supra*, since Cruz is slated for probable release after serving less than 24 months, the major impact of imposing a two-year maximum in lieu of an indeterminate term is to shorten the period of post-release supervision from a maximum of 51 months to 3 months. Cruz' complaint that his sentence is not being carried out as intended is thus limited to two points—the stated intentions of the Bureau of Prisons to deny him good time, and of the

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* We note, however, that the minutes of Cruz' sentencing reflect Judge Frankel's awareness of the Parole Commission's "preference" for an indeterminate sentence. It was only after defense counsel declined to say whether Cruz "would want a specifically prescribed sentence or under the youth provisions, or whether you want him just committed for the indeterminate term," Tr. of Feb. 11, 1976 pp. 11-12, that Judge Frankel created the composite sentence at issue on this appeal. In addition, Rule 35 provides that an illegal sentence may be corrected at any time.

Parole Commission to deny him a Section 5021 certificate —neither of which is yet ripe for adjudication.

The District Court properly held that neither of these issues could be litigated by use of Rule 35. With respect to the question of when Cruz will be released, the Court noted that "There is no reason to erase almost all of the sentence the court intended to impose"; this conclusion was particularly apt since crediting Cruz with the "good time" that he seeks would result in advancing his presently-projected release date by at most two months. While the cases and Title 18, United States Code, Section 4161 itself appear to establish that "good time" is not available to those serving indeterminate FYCA sentences, *Staudmier* v. *United States*, 496 F.2d 1191 (10th Cir. 1974); *Hale* v. *United States*, 307 F. Supp. 345 (D. Okla. 1970), the issue of whether one incarcerated pursuant to a definite sentence "under the Act" is precluded from earning "good time" by Title 18, United States Code, Section 5017(e), *see Foote* v. *United States*, 306 F. Supp. 627 (D. Nev. 1969), could simply and effectively be litigated in a motion filed pursuant to 28 U.S.C. § 2241, at such time as Cruz would be entitled to release were the good time credited.

Similarly, on any theory Cruz will not be eligible for a Section 5021 certificate until he is unconditionally discharged at the expiration of his sentence. If he is denied the certificate at that time, he will be at liberty to vindicate his rights through the mechanism of a mandamus action against the Parole Commission.*

The prematurity of Cruz' claims and the availability of effective remedies to protect his rights clearly distinguish this case from *United States* v. *Slutsky*, 514 F.2d 1222

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* Moreover, we fail to see any means other than vacating its sentence and imposing a lawful one, as we have urged, by which the District Court, by "reducing" Cruz' sentence, could have eased Cruz' present uncertainty as to his potential eligibility for the statutory certificate at issue.

(2d Cir. 1975), upon which Cruz principally relies. Cruz ignores the fact that in *Slutsky* the Parole Board was acting entirely within its discretion, although in a manner this Court found illogical. Thus, the defendants had no recourse to correct what had undeniably been a mistaken impression concerning the procedures of the Parole Board other than to seek reduction of their sentences. Furthermore, the Slutskys' initial application to the District Court was treated summarily, in direct contrast to the thorough consideration given by Judge Frankel. In this case, by contrast, if this Court finds Cruz' original sentence to have been valid, Cruz will be unconditionally discharged no later than two years from the date he surrendered to begin serving his sentence. As to such ancillary issues as "good time" and the vacatur certificate, denial of which Judge Frankel implied would violate his understanding of the judgment, Cruz has ample other remedies at his disposal that are directed to the proper parties.

Treatment of Cruz' claim in this fashion has another advantage as well: if the Court disagrees with what we submit is the only view of the FYCA based on the legislation itself and on its history, the problem will be one of greater dimensions than this case itself, since it is apparent that others may be in a situation similar to that of Cruz. To handle such situations in the *ad hoc* fashion of forcing district judges individually to exercise their discretion under Rule 35 is, we submit, an illogical approach that will only breed confusion. The far better solution is for this Court to declare Cruz' sentence valid or invalid and to allow Cruz to litigate the consequences of the sentence, if it is found valid, directly with the agencies charged with administering it. With this much of Judge Frankel's opinion we agree. Thus, if this Court disagrees with our analysis in Point I, in the alternative the order of the District Court should be affirmed.

CONCLUSION

The order of the District Court should be vacated, and the case remanded for resentencing as an adult or under one of the specific provisions of the Youth Corrections Act; in the alternative, the order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ALLEN R. BENTLEY,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

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